

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 17**

THE SUSAN B. ALLEN MEMORIAL HOSPITAL

and

GAY KIMBLE, an Individual

Case 14-CA-233000

and

LORI DASHNER, an Individual

Case 14-CA-233898

SUSAN B. ALLEN MEMORIAL HOSPITAL'S POST-HEARING BRIEF

Respondent Susan B. Allen Memorial Hospital respectfully submits its Brief to the
Administrative Law Judge.

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STATEMENT OF THE CASE

Respondent Susan B. Allen Memorial Hospital is a not-for-profit, general acute-care medical facility in El Dorado, Kansas. Susan B. Allen employs approximately 400 employees. On December 17, 2018, Gay Kimble filed a charge with the National Labor Relations Board against Susan B. Allen. Lori Dashner later filed a charge in January 2019.

Gay Kimble's termination was the result of her gross mishandling of the termination of Jim Holderman, who had falsified a fire safety form and was also terminated.

Lori Dashner was disciplined for various behavioral issues. Those issues culminated in her termination for a violation of Susan B. Allen's Electronic Communications policy.

Susan B. Allen lawfully terminated the employment of the Charging Parties. Susan B. Allen did not terminate or retaliate against any employee for engaging in protected activity.

STATEMENT OF FACTS

i. Charging Party Gay Kimble

1. The Human Resources Department's historically fraught relationship with Environment of Care Manager Alan Patterson.

Gay Kimble was employed at Susan B. Allen for approximately thirty-five (35) years, most recently as the Chief Human Resources Director. (Tr. 116:24-25; 117:1-11). Her job duties included handling staffing, benefits, and compensation. Gay Kimble also supervised the performance management of Susan B. Allen employees, including disciplines and terminations. (Tr. 117:12-18). Gay Kimble participated in the discipline process for Shane Krause, a security employee and direct report of Alan Patterson, the Environment of Care Manager. Alan Patterson's duties included, among other things, Hospital security and safety. Throughout this process, both Gay Kimble and Sheila Hoyt, the Human Resources Manager reporting to Gay Kimble, voiced frustrations with Alan Patterson's management and discipline style. (Tr. Page 201: 17-23). Gay Kimble, in e-mails to Alan Patterson's supervisor and COO/CIO Mark Rooker, stated that Mark Rooker might have to "talk [her] down from a good Alan beating!" (Exhibit 525; Tr. Page 201:14-23)

2. Alan Patterson approaches Sheila Hoyt with the results of an investigation regarding Susan B. Allen employee Jim Holderman and advises her that he is in favor of termination.

On October 31, 2018, the "Environment of Care Department" conducted a fire drill. (Tr. 151:8-9) These drills, mandated by the Joint Commission, occur at regular intervals and are closely monitored for compliance with Joint Commission standards.¹ During and after these fire drills, certain employees are required to submit reports concerning the results of the fire drill. (Tr. 151:14-16). In Mark Rooker's testimony, he confirmed the importance of the fire safety form and its impact on Susan B. Allen's ability to comply with joint commission standards and stay eligible to receive

¹ The Joint Commission is a non-profit organization tasked with accrediting health care organizations. This "accredited" status is a condition of licensure for the receipt of Medicaid and Medicare reimbursements, which constitutes a major source of income for Susan B. Allen Memorial Hospital.

federal funding. (Tr. 278:1-10). While organizing these reports, Safety Coordinator Pat Bradley discovered that one of the reports was incomplete. When approached with the incomplete report, the housekeeper whose name was on the report stated that she had not been at work on the day of the fire drill and did not fill out the document. (Tr. 151:20-25). When asked about the discrepancy, Jim Holderman, a painter and employee in Alan Patterson's department, admitted to falsifying the fire safety document. Alan Patterson immediately began an investigation, interviewing Jim Holderman, the housekeeper, and Pat Bradley to determine who had falsified the report and why.

On November 8, Alan Patterson approached Sheila Hoyt with the results of his investigation and informed her that Jim Holderman was responsible for the falsification. (Tr. 152:3-9). Alan Patterson recommended immediately terminating Jim Holderman. (Ex. 528)

3. Sheila Hoyt relays the information received from Alan Patterson to Gay Kimble.

After learning of the falsification, Sheila Hoyt went to Gay Kimble for advice and guidance. (Tr. 152:17-25) Gay Kimble testified that she was involved in all terminations at Susan B. Allen, as well as lesser levels of discipline as needed. (Tr. 145: 14-17).

4. Gay Kimble “coaches” Sheila Hoyt instead of participating in the investigation.

Despite her knowledge that Alan Patterson did not always comply with HR protocol, Gay Kimble chose not to get involved when another of Alan Patterson's direct reports faced disciplinary action. (Tr. 153: 9-22). Gay Kimble also knew that Sheila Hoyt was nervous about working with Alan Patterson. (Tr. 165:22-25). Gay Kimble, who had previously voiced her frustrations about Patterson to Mark Rooker, allowed Sheila Hoyt to take the lead in handling the falsification and speak with Mark Rooker about Jim Holderman's falsification. (Tr. 153: 9-22). Gay Kimble testified that she thought it was important that the leadership team “work together” and that this would be a “collaborative decision.” (Tr. 153: 17-22). Despite this belief, Kimble – the senior leader – chose

not to participate in any of the discussions with Alan Patterson, Mark Rooker, or any other person involved in Jim Holderman's disciplinary process.

Gay Kimble testified that she instructed Sheila Hoyt to ask Alan Patterson "If this was your best employee, would you fire them for this offense?" (Tr. 153:12-14). Sheila Hoyt and Gay Kimble also discussed the progressive discipline policy, despite the fact that Gay Kimble knew this was a clear Category 1 offense, which enabled management to terminate the employee without prior discipline in their file. (Tr. 199:15-19). Additionally, Jim Holderman *did* have prior discipline in his file. (Tr. 200:12-15)

5. Sheila Hoyt meets with Mark Rooker.

Sheila Hoyt met with Mark Rooker on November 9 to discuss the appropriate level of discipline for Jim Holderman. (Tr. 154:1-3). During the meeting, Mark Rooker stated that he was strongly in favor of termination and explained Jim Holderman's previous performance issues and discipline. Sheila Hoyt relayed comments Alan Patterson made during their initial conversation, and Mark Rooker agreed that clarification was necessary to ensure Jim Holderman was not "covering" for anyone. (Tr. 154:1-7). At her first meeting with Mark Rooker, Sheila Hoyt stated her position that a lesser level of discipline is appropriate, despite the fact that she knew this was a Category 1 offense. (Tr. 387:21-24)

6. Alan Patterson e-mails Sheila Hoyt and does not receive a response.

On Friday, November 9, Alan Patterson e-mailed Sheila Hoyt. In his e-mail, Alan Patterson inquired whether Sheila Hoyt had an update on the Jim Holderman situation after Sheila Hoyt's conversation with Mark Rooker. (Tr. 378:14-15). Alan Patterson received an automatic reply indicating that Sheila Hoyt was out of the office for the remainder of the day, and would not return until the following Monday. (Tr. 378:19-22). Gay Kimble was aware of Sheila Hoyt's absence. (Tr.

378:3-10). Neither Gay Kimble nor Sheila Hoyt respond to Alan Patterson's e-mail. (Tr. 378:15-16).

7. Gay Kimble requests an update on the Holderman discipline.

Nearly a week later, Gay Kimble e-mailed Sheila Hoyt on November 15, 2018. In the e-mail, Gay Kimble asked Sheila Hoyt about the status of the Jim Holderman investigation. (Tr. 381:11-17). In her testimony, Gay Kimble admitted that she was "concerned" because she had not heard anything about the situation since the previous Friday. (Tr. 156: 19-21). In what Gay Kimble characterized as a "coincidence," Sheila Hoyt responded saying they were on the "same page" and that she had requested an update from Alan Patterson that same day. (Tr. 207:11-16; Tr. 156:23-24). Sheila Hoyt testified that this e-mail exchange was an indication that the discipline process was "taking too long" and that it needed to be resolved quickly. (Tr. 381:22-23). Even after this e-mail, Gay Kimble did not accelerate the process and become more involved in conversations with other Hospital leaders. (Tr. 160: 3-5).

8. Sheila Hoyt and Gay Kimble meet with Quality Control Director Francina Bird.

Although Gay Kimble refused to speak to the leaders directly involved with the incident, she did recommend to Sheila Hoyt that they speak to Francina Bird, the leader in charge of quality control. (Tr. 157:21-25). Gay Kimble testified that she did not have knowledge or expertise regarding fire drills or the form that was falsified. (Tr. 157:21-25). Gay Kimble claimed that Francina Bird was the expert on safety and compliance. (Tr. 158:5-10).

In Mark Rooker's testimony, however, he explained why Francina Bird was a poor choice to consult on the matter. In 2016, when Mark Rooker took over as COO, which included oversight of the Environment of Care department, Susan B. Allen's accreditation status was "very bad." (Tr. 241:11-25; 278:12-22). Francina Bird was the leader in charge of that 2016 failed compliance

attempt. Mark Rooker and Alan Patterson, after receiving three follow-up visits from the Joint Commission in 2016, decided to raise the level of priority given to fire safety and completed projects to elevate Susan B. Allen's fire safety protocols. (Tr. 278:19-25).

Sheila Hoyt testified that she does not know why she did not contact Alan Patterson or Mark Rooker, the leaders in charge of fire safety and compliance, to determine the seriousness of the offense. (Tr. 386:1-3). She also stated that she had never before gone to Francia Bird regarding advice on a discipline. (Tr. 389:21-23).

During the meeting between Gay Kimble, Sheila Hoyt, and Francia Bird on November 15, Francia Bird stated that falsifying the document was "stupid" but Susan B. Allen could repeat the fire drill. (Tr. 159:4-8). Despite the fact that this was a Category 1 terminable offense, and that Jim Holderman's actions would necessitate the entire Hospital go through another fire drill, Francia Bird recommended a mere "slap on the wrist." (Tr. 159:18).

9. Sheila Hoyt and Mark Rooker meet again on November 16 and again fail to agree on a discipline level.

Gay Kimble instructed Sheila Hoyt to meet again with Mark Rooker to discuss Holderman's discipline. Gay Kimble did not attend, but testified that she told Sheila Hoyt to "be collaborative" but Mark Rooker would ultimately "get to make the decision on where [the discipline] landed." (Tr. 160:13-19). Sheila Hoyt and Mark Rooker met on the 16th and still did not reach an agreement on the level of discipline appropriate for Holderman. Mark Rooker insisted that termination was appropriate since the Susan B. Allen Discipline Policies clearly list falsification of Hospital documents as a Category 1 offense. (Ex. 537). Sheila Hoyt maintained that, although it was a Category 1 offense by an employee with previous discipline, she believed suspension was appropriate. (Tr. 388:6-13). They decided to let Jim Kirkbride make the final decision since he had to sign off on all terminations. (Tr. 388:19-22). Sheila Hoyt and Mark Rooker both agreed that they

would speak to Jim Kirkbride that day since Holderman was leaving at 3:00p.m. on the 16th and would not return to work until the 28th. (Tr. 161:13-17).

10. Mark Rooker meets with Jim Kirkbride and explains the HR department's inability to take the falsification seriously and agree to termination.

After his meeting with Sheila Hoyt on the 16th, Mark Rooker met with Jim Kirkbride to explain the status of the Jim Holderman falsification. Jim Kirkbride had general knowledge of the situation, but was not fully aware of the breakdown in the collaborative process between leaders and Human Resources until his meeting with Mark Rooker on the 16th. (Tr. 281:3-9). No one from Human Resources met with Jim Kirkbride on the 16th. (Tr. 161:20-25).

11. Jim Kirkbride drafts Gay Kimble's termination document.

Once he was told of the difficulty Mark Rooker and Patterson faced trying to terminate an employee for a Category 1 offense, Jim Kirkbride drafted Gay Kimble's termination document on November 17, 2018. (Tr. 284: 10-12). Jim Kirkbride disciplined Gay Kimble as head of the department for her failure to get involved, failure to handle discipline in a timely manner, and failure to support Patterson, who was trying to enforce the clear safety policies of Susan B. Allen. (Ex. 550). Human Resources knew that Holderman would be out on leave until November 28, and still did not push to resolve the situation in time to present the discipline before he left on the November 16. (Tr. 290:14-17).

12. Gay Kimble meets with Jim Kirkbride and Mark Rooker to discuss her lack of involvement in Holderman's termination process.

On November 19, after beginning Gay Kimble's termination document but before making a final decision on termination, Jim Kirkbride met with Gay Kimble and Mark Rooker to discuss the failure to resolve the Holderman discipline before he went on leave. (Tr. 162:13-24). During the meeting, Gay Kimble answered questions about Holderman's discipline process and her lack of

involvement. (Tr. 162-170). It was clear to Gay Kimble that both Jim Kirkbride and Mark Rooker considered the falsification a clearly terminable offense. (Tr. 163:20-21).

Gay Kimble testified that during the meeting on the 19th she said she was “trying to be very careful to stay close to this investigation and keep an eye on it.” However, later in the meeting Gay Kimble also stated that she told Jim Kirkbride if he wanted to know specific dates he’d have to ask [Sheila Hoyt] since “[Sheila Hoyt] was more deeply involved and I was not deeply involved.” (Tr. 166:1-3; 22-24). When Jim Kirkbride said “You should have been deeply involved. This is a very serious offense and you should have been deeply involved,” Gay Kimble had no response. (Tr. 166:25; 167:1-3).

13. Gay Kimble apologizes to Alan Patterson for her lack of involvement in Holderman’s termination process.

After her meeting with Jim Kirkbride and Mark Rooker on November 19, Gay Kimble apologized to Patterson for not getting involved in Holderman’s discipline. (Tr. 170:15-21). Patterson confirmed this exchange in an e-mail to Mark Rooker. (Ex. 536). Neither Mark Rooker nor Jim Kirkbride requested that Gay Kimble apologize to Patterson. (Tr. 291:7-16).

14. Jim Kirkbride e-mails Mark Rooker a copy of Gay Kimble’s termination document at 8:04 a.m.

On the morning of November 20 at 8:04 a.m., Jim Kirkbride e-mailed Mark Rooker a draft of Gay Kimble’s termination document. The metadata from that document confirmed that it was created on November 17 at 11:45 a.m., and finalized at 9:02 a.m. on November 20. (Exhibit 550; Tr. 285:17-21). Although Mark Rooker did not remember “word for word” if the draft he received was identical to the final, executed copy, he testified that he recalled they were substantially similar and that no material changes had been made between his viewing and the final version signed by Gay Kimble.

15. The senior leadership team meets and discusses Lori Dashner's status as a potential physical threat to employees.

Later in the morning on November 20, the senior leadership team held a special meeting. At the meeting, the Chief Nursing Officer, Cecelia Goebel, stated that she thought Lori Dashner posed a potential safety threat to the Hospital. (Tr. 172: 9-17).

After the meeting, Gay Kimble e-mailed Jim Kirkbride and advised him that although Lori Dashner might pose a safety threat, leadership must think carefully about terminating her employment. (GC Ex. 7D). In her testimony, Gay Kimble acknowledged that she understood Lori Dashner was not immune from *all* disciplinary action simply because she engaged in protected activity. (Tr. 182:13-23). Jim Kirkbride forwarded Gay Kimble's e-mail to Mark Rooker indicating his frustration with Gay Kimble's lack of concern for the safety of Susan B. Allen employees and patients. (GC Ex. 7D). With Gay Kimble's lack of concern regarding Lori Dashner's potential safety threat and Gay Kimble's failure to address a serious safety violation by Holderman, Jim Kirkbride was – without question – ready to terminate Gay Kimble.

16. Gay Kimble is terminated.

During the period between drafting Gay Kimble's termination document on November 17 and presenting it on the 20th, Jim Kirkbride gathered information about Holderman's disciplinary process and sat down with Mark Rooker and Gay Kimble together to hear from the senior leaders involved in the process. Because of Gay Kimble's lack of involvement and inconsistent statements during that November 19 meeting, Jim Kirkbride implemented Gay Kimble's termination. Jim Kirkbride terminated Gay Kimble's employment at 2:00p.m. on November 20, four days after originally drafting her termination document. (Tr. 174: 5-13).

17. Jim Holderman is terminated.

Jim Holderman's employment was terminated the day he returned from leave, November 28, nearly a full month after he falsified the fire safety form. (Ex. 532).

ii. Charging Party Lori Dashner

18. Lori Dashner has a history of "difficult" behavior.

Lori Dashner was employed at Susan B. Allen for approximately twenty (20) years, most recently as the Meditech Coordinator in the Information Systems department. As Meditech Coordinator, Lori Dashner's job duties included maintenance of the Meditech, which was the computer documentation system that housed nursing and patient records. (Tr. 24:10-20). For approximately 4 years, Mark Rooker was Lori Dashner's direct supervisor. (Tr. 242:7-11). Mark Rooker testified that Lori Dashner was often challenging to manage. (Tr. 253: 23-25). Gay Kimble testified that for years Mark Rooker had come to her frequently to discuss Lori Dashner's performance and behavior issues. (Tr. 146:18-25; 147:1-2). Lori Dashner's direct supervisor for the two years prior to her termination was Diana Wasson. Diana Wasson testified that she began noticing Lori Dashner's outbursts and other behavioral issues at the beginning of 2018. (Tr. 405:14-16). During her time as Lori Dashner's supervisor, Diana Wasson often kept notes regarding Lori Dashner's problematic interactions, even those that did not result in formal discipline. (Tr. 405:1-13).

19. Lori Dashner sends an unauthorized e-mail regarding "Top-Desk" to the entire hospital.

On September 11, Lori Dashner sent an e-mail to the entire Hospital staff regarding issues with "Top-Desk Tickets." (Tr. 412:1-6). Diana Wasson testified that Top-Desk Tickets are essentially customer service requests by Susan B. Allen employees to the IT department. (Tr. 406:16-18). In order to "close" a ticket, IS employees speak to the staff member who opened the

ticket and discuss the issue with them. (Tr. 413:3-7). Although the Meditech team conducted weekly meetings to discuss Top-Desk and other department functions, Lori Dashner neither sought nor received approval to close the tickets or e-mail the entire staff regarding IS operating procedures. (Tr. 412:1-6). Diana Wasson immediately brought the issue to the attention of her supervisor, Mark Rooker and suggested that disciplinary action might be appropriate. (Tr. 415:6-12).

20. Diana Wasson requests assistance from Gay Kimble in addressing Lori Dashner's Unauthorized Top-Desk E-mail.

After discussing the Top-Desk e-mail with Mark Rooker, Diana Wasson requested Human Resources assistance from Gay Kimble to determine the appropriate level of discipline, if any, for Lori Dashner. (Tr. 413:8-9). After listening to Diana Wasson's concerns, Gay Kimble suggested a "Skills Update" might be appropriate, but if Diana Wasson wanted to have a structured conversation about it before going to a Skills Update, that would be fine. (Tr. 417:1-7). Diana Wasson decided to first try to have a conversation with Lori Dashner to explain why the Top-Desk e-mail was inappropriate. (Tr. 422:15-24).

21. Diana Wasson has a structured conversation with Lori Dashner regarding her unauthorized all-hospital e-mail.

On September 12, 2018, Diana Wasson sat down with Lori Dashner to discuss her issues with Lori Dashner's decision to send the Top-Desk e-mail. (Ex. 505). Diana Wasson indicated that Lori Dashner had stepped over the line when sending the e-mail, which dealt with operations of the IS department. Diana Wasson explained that the goal of the conversation was for Lori Dashner to clearly understand her function in the IS department so she did not infringe on other employees' jobs or create confusion regarding IS operations. (Ex. 505). Diana Wasson also testified that she was concerned that Lori Dashner did not discuss with her the procedure for closing the tickets but instead sent a hospital-wide e-mail without seeking or receiving approval for that action. (Tr. Page 412:23-

25). After listening to Diana Wasson's concerns about team work, customer service, and chain of command, Lori Dashner became "elevated," argumentative, and adamant that she did nothing wrong. (Ex. 505).

22. Lori Dashner receives a Skills Update.

Because Lori Dashner was not receptive to Diana Wasson's concerns in the September 12 conversation, Diana Wasson decided to progress to a formal Skills Update. (Tr. 423:13-21). A Skills Update is not a disciplinary action, but rather a "coaching tool" used to formally set goals and expectations for employees. (Tr. 187: 2-3). Diana Wasson, with assistance from Gay Kimble, drafted the document and presented it to Lori Dashner on September 17, 2018. (Tr. 424:1-2).

During the presentation of the Skills Update, Lori Dashner acted out and became volatile and angry. (Tr. 424:16-24). Diana Wasson, both in her testimony and her recounting of the meeting in e-mails to Gay Kimble, stated that Lori Dashner yelled, threatened her resignation, and still refused to receive constructive criticism about her work performance. (Tr. 424:16-24; Ex. 508).

23. Lori Dashner receives an Oral Warning.

Even after receiving the Skills Update, Lori Dashner's behavior and performance did not improve. (Tr. 425: 9-25). On September 28, Lori Dashner sent an e-mail to members of the IS department, including Diana Wasson and Mark Rooker, that was defiant in tone and said: "I feel that I have probably overstepped my role in the past so I don't care to receive any more skills updates or disciplinary action for doing what I think needs to be done." (Ex. 514). Mark Rooker then forwarded that e-mail exchange to Gay Kimble who replied "This girl is so gutsy!! We will do discipline when we, the leaders, see fit. Grr. She makes me crazy!!" (Ex. 514).

Throughout the end of September and beginning of October, Lori Dashner also acted out during the weekly coordinator meetings with Diana Wasson. (Tr. 425:20-25). Diana Wasson

testified that she was at a loss as to what to do and did not know how to communicate with Lori Dashner, since “everything seemed to be turned to a negative.” (Tr. 425:24-25). Not only was Lori Dashner negative, she also became increasingly sarcastic, telling Diana Wasson that management wanted everything to be “rainbows and unicorns.” (Tr. 426:1-4).

On October 24, Diana Wasson presented Lori Dashner with an Oral Warning for violating the Standards of Behavior on multiple occasions in the month of October. (GC Ex. 4B). After receiving the Oral Warning, Lori Dashner requested performance reviews after every interaction with fellow employees. Diana Wasson relayed the request to Gay Kimble, who suggested a weekly meeting might be more appropriate.

Gay Kimble testified that she believed the oral warning and skills update presented to Lori Dashner were justified based on her behavioral and performance issues. (Tr. 194:2-4).

24. Susan B. Allen Receives Legal Guidance.

In August and September of 2018, the Susan B. Allen senior leadership team sought guidance from Forrest Rhodes, an attorney, regarding protected concerted activity and how to avoid discipline that would violate the National Labor Relations Act. (*see* GC Ex. 5(a)-(f)). During the conversations with Rhodes, Mark Rooker, Gay Kimble, and Jim Kirkbride asked questions and received direct, clear guidance on what they could and could not do under the National Labor Relations Act. This guidance established a clear line that leaders at Susan B. Allen knew they could not cross. Although the senior leadership team had serious concerns about confidentiality of information and Lori Dashner’s access to hospital systems, they followed guidance from Rhodes and stayed on the right side of the line, refraining from disciplining Lori Dashner for anything related to her protected Facebook posts.

25. Lori Dashner downloads an internal, hospital-owned marketing photo.

In her testimony, Lori Dashner admitted to downloading the photo of Jim Kirkbride from the Highlights by taking a screenshot from her phone. (Tr. 31:2-3). Although Dasher refused to characterize it as such, this screenshot constituted a “download.” (Tr. 306:8-13). The photo was taken from the Hospital’s newsletter and then saved on her phone.

Prior to this, Lori Dashner had once before been in an area of the Hospital’s computer systems where she was not allowed when she emulated an HR employee’s Meditech menu and had access confidential information. (See Ex. 504).

26. Mark Rooker’s investigation into Lori Dashner’s computer reveals violations of the Hospital’s Electronic Communication Policy.

On November 19, 2018, Lori Dashner posted the internal marketing photo to Facebook. After realizing the photo was an internal-only marketing picture, Jim Kirkbride requested both Mark Rooker and the marketing team ensure the photo had not been used outside the Hospital. (GC Ex. 7B).

While searching for the marketing photo, Mark Rooker entered Lori Dashner’s Susan B. Allen folder structure and did a sweep to determine if she had saved the photo to her computer. (Tr. 270:18-24). During that search, Mark Rooker discovered in excess of 500 personal files stored on Lori Dashner’s computer including divorce records, personal tax records, and legal documents regarding multiple stalking claims made against Lori Dashner. (Tr. 265:21-25).

Chase Locke, Executive Director of the Susan B. Allen MH Foundation, confirmed that the photo had only been used in the Hospital’s internal employee newsletter, the Highlights. (GC Ex. 7C).

27. Lori Dashner is terminated.

After considering the previous guidance from Forrest Rhodes, Mark Rooker made the decision to terminate Lori Dashner's employment on November 20 for violations of Susan B. Allen Electronic Communications policy and in accordance with the progressive discipline system. Gay Kimble testified that she was never consulted about Lori Dashner's termination. (Tr. 214:19-21).

LEGAL ANALYSIS AND ARGUMENT

1. Susan B. Allen lawfully terminated Gay Kimble's employment.

Although supervisors are not included in the Act's definition of "employee" (29 U.S.C. § 152(3)), and are thus not entitled to the Act's direct protection, a supervisor's discharge may violate Section 8(a)(1) if it infringes on the Section 7 rights of employees. *International Longshoremen Ass'n v. Davis*, 476 U.S. 380, 384 n.4 (1986); *NLRB V. Talladega Cotton Factory, Inc.*, 213 F.2d 209, 216-17 (5th Cir. 1954).

Supervisory discharge cases are resolved by the following analysis: "The discharge of supervisors is unlawful when it interferes with the right of employees to exercise their rights under Section 7 of the Act, as when they give testimony adverse to their employers' interest or when they refuse to commit unfair labor practices." *See Parker-Robb Chevrolet, Inc.*, 262 NLRB 402, 404 (1982) ("*Parker-Robb*"), *enforced sub nom. Automobile Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983); *see also Talladega Cotton Factory Inc.*, 213 F.2d 209, 216-17; *Marshall Durbin Poultry Co. v. NLRB*, 39 F.3d 1312, 1315-16 (5th Cir. 1994). In this case, Gay Kimble is alleging that she was terminated for her refusal to commit an unfair labor practice, namely, her refusal to fire Lori Dashner, an employee engaged in protected activity.

a. The General Counsel did not meet her burden to show that Gay Kimble's alleged refusal to terminate Lori Dashner was a motivating factor in her termination.

In order to establish that Gay Kimble was terminated for refusing to commit an unfair labor practice, the General Counsel must first show, by a preponderance of the evidence, that Gay Kimble's alleged protected conduct was a motivating factor in the adverse action. The General Counsel satisfied this initial burden by showing: (1) Gay Kimble was engaged in protected activity; (2) her employer had knowledge of such activity; and (3) animus. If this initial burden is met, the

burden shifts to the employer to prove that it would have taken the adverse action, even absent the protected activity. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* on other grounds 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *see also*, *Mesker Door*, 357 NLRB 591, 592 (2011).

The General Counsel cannot meet their initial burden. In this case, Gay Kimble's alleged protected activity was refusing to fire Lori Dashner. However, the General Counsel presented no evidence that Kimble was ever asked to fire Lori Dashner by Jim Kirkbride, Mark Rooker, Diana Wasson, or any member of the senior leadership team.

Because of General Counsel's decision to only question the decision-maker, Jim Kirkbride, for an extremely brief examination, and because of her failure to ask any questions regarding the intent behind Gay Kimble's termination, General Counsel's burden of proof rests entirely on the exhibits admitted during Jim Kirkbride's testimony. Those exhibits (GC Ex. 7(a)-(g)) document the investigation into Lori Dashner's download of the internal marketing photo (GC Ex. 7(a)-(c)) and a conversation between senior leaders about Lori Dashner as a security threat, conducted *after* Jim Kirkbride made the decision to terminate Gay Kimble. (GC Ex. 7(d)). General Counsel also introduced e-mails confirming the timeline of Human Resources' involvement in the Jim Holderman termination. (GC Ex. 7(f), 7(g)). None of the exhibits presented establish the necessary elements of General Counsel's initial burden.

To the extent that the General Counsel argues she did not have the *opportunity* to ask substantive questions of Jim Kirkbride, that allegation is patently wrong. The General Counsel subpoenaed Kirkbride's presence at the hearing, and he appeared. When asked to take the stand by General Counsel, he complied. His status as a 611(c) witness in no way prevented the General Counsel from asking substantive questions of Jim Kirkbride. She had the opportunity to do so. She

declined and limited her questions. After questioning Jim Kirkbride for approximately 20 minutes, General Counsel rested their case. Upon realizing that, in resting their case without asking any substantive questions of Jim Kirkbride General Counsel had almost certainly failed to meet their initial burden, Respondent made the decision not to re-call Jim Kirkbride to the stand. Gay Kimble's attorney, Don Peterson, admitted on the record that this was a "great strategic decision." (Tr. 321:2). Blaming Respondent for not making the General Counsel's case cannot rescue the General Counsel's failure to present substantive proof necessary to prove an NLRA violation. And trying to make the case by arguing an adverse inference from Respondent not calling Jim Kirkbride to the stand *again* is inappropriate, since Jim Kirkbride was in fact called as a witness in General Counsel's case in chief, was available for substantive questioning, but was asked nothing about his decisions.

Gay Kimble's only recorded objection to Lori Dashner's termination was made *after* the decision was made to terminate Gay Kimble's employment. (See Ex. 550; GC Ex. 7D).

b. The General Counsel did not meet her burden to show that protected activity was a motivating factor; moreover, Susan B. Allen would have taken the same action in the absence of Gay Kimble's opposition to Lori Dashner's termination.

Even if the General Counsel could meet their initial burden, the evidence clearly establishes that Susan B. Allen would have terminated Gay Kimble even in the absence of any alleged protected activity.

A serious violation of safety procedures was committed, discovered, investigated, and reported to Human Resources all within a one-week period. Because of failures within the Human Resources department, the discipline for that violation was not carried out for an additional three weeks. As the leader of the Human Resources department, Gay Kimble was ultimately responsible for these failures. She remained close enough to the process to understand that her assistance was needed, but not close enough to actually communicate with other leaders or offer her expertise. Gay

Kimble's non-responsiveness in the face of serious safety violations and her failure to act in support of her own team and her fellow managers would have resulted in her termination regardless of any alleged refusal to terminate Lori Dashner.

General Counsel's only attempt to establish pretext was to present evidence that the terminations occurred on the same day. Although the timing of a termination can be used to discredit an employer's stated reason for termination, it can also be used to support it. *See NLRB v. Joy Recovery Tech. Corp.*, 134 F.3d 1307, 1314 (9th Cir. 1998) (stating that the timing of a decision to close a department could be seen either as suspicious, in light of the recent union activity, or a reasonable business decision in light of the department's recent difficulties. The court stated that the timing "supports both sides"). General Counsel asserts that, because the terminations happened on the same day, they must be related. However, the timing also supports Susan B. Allen's position. Jim Kirkbride drafted Gay Kimble's termination document on November 17, immediately after he discussed Jim Holderman's disciplinary process with Mark Rooker. Jim Kirkbride then gave Gay Kimble the chance to explain herself in a meeting on November 19. Finding her explanation of events inconsistent and unsatisfactory, Jim Kirkbride proceeded with Kimble's termination the next day.

Separate and apart from this decision-making process, a series of events occurred that led to Lori Dashner's termination. Those events coincidentally came to a breaking point on the same afternoon that Gay Kimble was terminated.

2. Susan B. Allen's actions toward Lori Dashner were lawful.

The Complaint alleges that Respondent terminated Ms. Lori Dashner for her protected concerted activities. However, the record clearly established that Ms. Lori Dashner's termination was the result of policy violations and progressive discipline.

Terminating an employee for protected concerted activity is unlawful. *Citizens Investment Services Corp. v. NLRB*, 430 F.3d 1195, 1197 (D.C. Cir. 2005), 30 enfg. 342 NLRB 316 (2004). As we are reminded:

The Act protects all employees, not just exemplary employees, from adverse action by an employer based on their protected activity. In cases like this, in which there may be lawful grounds for discipline, it is our job to determine whether the alleged discriminatee was indeed disciplined because of his protected activity, using the analytical tools developed by the Board over its many years of enforcing this provision of the Act, with the approval of the courts.

Alternative Energy Applications, Inc., 361 NLRB No. 139, slip op. at 5(2014).

As discussed above, where arguably more than one motive exists for alleged discriminatory action for protected concerted activity, the analysis is set forth in *Wright Line* is applied. Under *Wright Line*, the General Counsel must first establish that the worker's protected conduct was a motivating factor in the adverse action. This is satisfied by proving: (1) the individual's protected activity; (2) employer knowledge of such activity; and (3) animus. If this initial burden is met, the burden shifts to the employer to prove that it would have taken the adverse action, even absent the protected activity. *See, e.g., Mesker Door*, 357 NLRB 591, 592 (2011).

The employer cannot meet its burden merely by showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. *Bruce Packing Co.*, 357 NLRB 1084, 1086–1087 (2011); *JCR Hotel, Inc. v. NLRB*, 342 F.3d 837, 841 (8th Cir. 2003). If the employer's proffered reasons are pretextual (i.e., either false or not actually relied on), the employer fails to show that it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007).

With regard to the Skills Update, Oral Warning, and Termination, the alleged protected activity that allegedly precipitated each is Lori Dashner's many Facebook posts critical of Susan B.

Allen. In General Counsel's opening statements, they referred to Lori Dashner's "protected concerted Facebook posts." (Tr. 13:11-12). To the extent that General Counsel argued that any other conduct by Lori Dashner constituted protected, concerted activity, they have not presented evidence to establish those activities were protected. Therefore, Respondent's admission that Lori Dashner engaged in protected activity applies only to Lori Dashner's Facebook postings and no other conduct. (Tr. 22:13-14).

Here, there is ample evidence to show that, regardless of whether the General Counsel can meet their initial burden, Susan B. Allen would have presented a skills update, an oral warning, and termination to Ms. Lori Dashner in the absence of protected conduct.

a. Susan B. Allen's presentation of a Skills Update and Oral Warning to Lori Dashner were lawful.

i. The General Counsel did not meet her burden to show that there was knowledge and/or animus on the part of Diana Wasson against Lori Dashner's protected activity.

Susan B. Allen presented Lori Dashner with a Skills Update on September 12, 2018. First, the record is clear that the skills update is not a disciplinary tool. Additionally, Susan B. Allen does not argue that Ms. Lori Dashner's Facebook posts were not protected activity. However, the General Counsel failed to establish that Diana Wasson, who presented the Skills Update, had any knowledge of or animus toward the posts. During Diana Wasson's testimony, she was never asked whether she was aware of Lori Dashner's Facebook postings, or whether she did or did not like them.

ii. The General Counsel did not meet her burden to show that protected activity was a motivating factor; moreover, Diana Wasson would have taken the same action in the absence of Lori Dashner's protected activity.

Even if Diana Wasson had known about Lori Dashner's social media activity and the General Counsel could prove animus, Diana Wasson would have still presented the Skills Update and Oral

Warning to Lori Dashner. Diana Wasson's concerns regarding Lori Dashner's behavior and her effect on the office necessitated disciplinary action. Diana Wasson tried other, informal methods in order to resolve Lori Dashner's issues, but when those failed was forced to present formal discipline with the full cooperation of Human Resources. The evidence clearly establishes that Lori Dashner's e-mail regarding Top-Desk was the motivation for the Skills Update, and her negative attitude and failure to follow behavior standards in her communications with other employees was the motivation behind her Oral Warning. Diana Wasson's decision to present those documents to Lori Dashner was in no way related to her Facebook posts, and would have occurred in their absence.

b. Susan B. Allen's termination of Lori Dashner was lawful.

In certain cases in which the employer has disciplined an employee for asserted misconduct, the Board permits the employer to meet its Wright Line defense if it can establish, under all of the circumstances that it had a reasonable, good-faith belief that the employee engaged in the misconduct, and that it acted on that belief in taking the adverse employment action against the employee. This arises in cases involving misconduct of a severe nature in which the employer conducted an extensive investigation that substantiated its reasonable belief of the employee's misconduct. *See, e.g., DTR Industries*, 350 NLRB 1132, 1135–1136 & fn. 29 (2007) (“Given the magnitude of the financial loss caused by this 2-day spurt of ruined production, and the Respondent's careful elimination of other bases to explain the production errors,” the respondent established its reasonable belief that the employee intentionally produced defective products), *enfd.* 297 Fed. Appx. 487 (6th Cir. 2008) (unpublished); *GHR Energy Corp.*, 294 NLRB 1011, 1012–1013 (1989) (Respondent met its Wright Line burden by establishing that it would have suspended the employees, even in the absence of their protected activity, because based on its investigation, the

respondent reasonably believed the employees had engaged in serious misconduct endangering other employees and the plant itself.), enfd. 924 F.2d 1055 (5th Cir. 1991) (unpublished).

The principles from these cases apply here. Susan B. Allen conducted an investigation into Lori Dashner's computer in order to determine whether a violation of their Electronic Communications Policy had occurred. Based on that investigation, Susan B. Allen reasonably believed that Lori Dashner had been abusing Susan B. Allen property for years, storing nearly 1,000 personal documents on her work computer. Additionally, although they did not find the marketing photo on Lori Dashner's computer (because it was in her phone), her history of accessing information she was not authorized to access (See Ex. 504).

Board precedent clearly establishes that it is reasonable for companies to terminate individuals who steal information from company files. *See NLRB v. Brookshire Grocery Co.*, 919 F.2d 359, 363 (5th Cir. 1990) (holding that employer lawfully discharged employee after he stole wage information from his supervisor's office); *W.R. Grace Co.*, 240 NLRB 813, 820-21 (NLRB 1979) (holding that employer lawfully discharged employee for stealing salary information from company files); *Bullock's*, 251 NLRB 425 (NLRB 1980) (holding that company lawfully discharged employee for wrongfully obtaining employee evaluations). The "internal use only" photo of CEO Jim Kirkbride was designated as such intentionally. The photo depicts him in a shirt and tie, without a suit jacket. Mark Rooker testified that this was in order to make him feel approachable to employees, whereas a more formal photo would have been used for external marketing. Lori Dashner's download of an internal Hospital marketing photo was a clear violation of Susan B. Allen's Electronic Communication Policy. "The [National Labor Relations] Act does not prevent an employer from disciplining an employee for violating established company rules and policies" *Asarco, Inc. v. NLRB*, 86 F.3d 1401, 1409 (5th Cir. 1996). Lori Dashner's protected activity did not

give her immunity from valid disciplinary actions. Management reasonably believed she had violated Hospital policy, and the National Labor Relations Act allowed them to discipline her for those violations.

Additionally, it is important to note that Lori Dashner exposed Susan B. Allen to potential liability and harm through her abuse of Hospital property. Susan B. Allen has a duty under to protect patient and employee information. By downloading, importing, and saving nearly 500 documents, photos, and other information on the Hospital's server, Lori Dashner exposed the system to potential malware and viruses, which could have posed a security threat to patient and employee information. The Electronic Communication Policies are there in order to prevent this type of exposure, and as an IS employee, Lori Dashner's compliance with those policies was especially important.

Lori Dashner's termination was the result of serious violations of Hospital policy, and would have occurred even if she had not been engaged in protected activity.

CONCLUSION

The General Counsel failed to meet her burden on any of the allegations brought by the Charging Parties. It is the General Counsel's burden to make a prima facie showing that the Charging Parties' protected activity was a motivating factor in the adverse employment action taken against them. *NLRB v. Int'l Ass'n of Bridge Structural & Ornamental Iron Workers*, 864 F.2d 1225, 1231 (5th Cir. 1989). The General Counsel must demonstrate the employer's antipathy toward the employees' protected activity and a causal link between the antipathy and the adverse employment action. *E.C. Waste, Inc. v. NLRB*, 359 F.3d 36, 42 (1st Cir. 2004). "Mere suspicions of unlawful motivation" are insufficient to establish violation of the NLRA. *Asarco, Inc. v. NLRB*, 86 F.3d 1401, 1409 (5th Cir. 1996). General Counsel did not meet this burden.

It is undisputed that adverse employment action was taken against the Charging Parties when they were terminated by Susan B. Allen. However, each independent termination was based on legitimate, non-retaliatory reasons that do not violate the NLRA. General Counsel did not prove that the Skills Update was a disciplinary action that reflected negatively on Lori Dashner's employment. General Counsel also failed to prove any animus by Diana Wasson or Mark Rooker, the decision makers for Lori Dashner's Skills Update, Oral Warning, and Termination. Beyond that, General Counsel failed to prove – or present documentary evidence supporting – any causal link between alleged animus and any adverse employment action.

Embedded in every element of proving an alleged NLRA violation is the age-old legal concept of causation. That question here with regard to Lori Dashner is, did her Facebook posts cause the decision maker Mark Rooker to terminate Dashner. If those Facebook posts were a motivating factor, her termination would have occurred when they began, not months later. And this can hardly be called a “gotcha” termination for a violation of some incidental policy which was pretextual to hide a termination that would violate the NLRA. Dashner's treatment of her supervisor in a dispute over non-NLRA protected Top-Desk issues and her aggressive, elevated, threatening behavior that many felt posed a direct physical threat to Hospital employees – combined with a clear violation of the Hospital's Electronic Communications Policy – provided the decision-maker every reason to terminate a poor performing employee who did not adhere to the Hospital's policies.

Gay Kimble's situation is equally as clear. There was never an instruction to Kimble to fire Dashner which Kimble refused. The undisputed fact, set out clearly in the termination document's metadata, is that the decision to terminate Dashner was made after the decision to terminate Kimble. And Kimble, along with Jim Holderman (who was not involved in any NLRA activity) were both terminated for legitimate safety violations.

The overwhelming evidence presented during the hearing proves that Susan B. Allen has engaged in only legitimate, lawful business practices and treatment of its employees. General Counsel presented nothing more than the subjective belief and self-serving testimony of the Charging Parties that their alleged protected activity was the cause of the adverse employment actions against them.

Simply put, Susan B. Allen terminated two of its employees for very different reasons on the same day. Accordingly, Respondent respectfully requests that Susan B. Allen be cleared of all charges.

Dated: August 6, 2019

Respectfully submitted,

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